ANG GIN LEE

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
MOHD. JEMURI SERJAN SCJ
[CRIMINAL APPLICATION NO. 07-19-90]
1 FEBRUARY 1991

CIVIL PROCEDURE: *Revisionary and supervisory powers of High Court - Whether appeal from order of Magistrate - Criminal Procedure Code, ss. 323, 325 - Courts of Judicature Act 1964, ss. 31, 32, 33, 35 - Dangerous Drugs Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1).*

STATUTORY INTERPRETATION: *Drug treatment and rehabilitation - Magistrate's order under s. 6(1) Drug Dependants (Treatment and Rehabilitation) Act 1983 - Whether criminal case or matter - Final order - Jurisdiction of Court to impose punishment - Whether right of appeal to High Court - Criminal Procedure Code, s. 307(i) - Courts of Judicature Act 1964, ss. 31, 32, 33, 35.*

On 19 February 1990, the Miri Magistrate pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (the 1988 Act) ordered the applicant, A, to undergo treatment and drug rehabilitation at a drug rehabilitation centre at Kuching (the said order). On appeal, the trial Judge, in dismissing A's appeal held that the said order was not an order pronounced by a Magistrate Court in a criminal case or matter to which A is a party under s. 307(i) of the Criminal Procedure Code (CPC) and therefore A has no right of appeal. The High Court also held that it could not exercise its revisionary and supervisory powers under ss. 323, 325 of the CPC and s. 35 of the Courts of Judicature Act 1964 (the 1964 Act). A appealed against the rulings.

Held:

[1] (a) The criminal jurisdiction of a First Class Magistrate is provided in s. 85 of the Subordinate Courts Act (SCA);

(b) the term "Subordinate Court" as referred to s. 26 of the 1964 Act is defined in s. 3 to mean any inferior Court from the decision of which by reason of any written law there is a right of appeal to the High Court.

[2] The legislative scheme of s. 6 of the 1983 Act viewed with the provisions of criminal jurisdiction and appeal in the SCA and 1964 Act show quite clearly that the order of the Magistrate under s. 6 of the 1983 Act is not an order appealable to the High Court.

[3] (a) Before the said order could be said to be made in a criminal case or matter as referred to in s. 307(i) of the CPC, the order must first of all be a final order; the test for determining the finality of the order is to see whether the order finally disposes the rights of the parties; in this case, the said order had a final effect and dispossessed of A's right.

(b) the court relied on *Amand's* case and said that to be a criminal case or matter, firstly, it must involve the consideration of a crime or an offence against the public law and secondly the charge must be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence;

(c) looking at the provisions relating to jurisdiction of the Magistrate and the appeal provisions provided by our law, the Court agreed with the learned Judge that the order made by the Magistrate in this case is not an order pronounced by a Magistrate's Court in a criminal case or matter for the purpose of s. 307(i) of the CPC.

[4] There for as under s. 31 of the 1964 Act, the High Court possesses powers of revision in respect of criminal proceedings and matters in the Subordinate Courts in accordance with any law for the time being related to criminal procedure, the High Court could not review the decision of the learned Magistrate.

[5] According to existing provisions of the law there is no appeal to or revision by the High Court from the order of the Magistrate under s. 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983.

[6] The 1983 Act, which is a social legislation of sorts, confers summary powers on the Magistrate and can seriously affect the freedom of an individual; any person who is dissatisfied with the order of the Magistrate under that provision of the law because of some irregularity could have access to the High Court but not through the appeal process.

[7] Reading s. 35 in the context of ss. 31, 32 and 33 of the 1964 Act, s. 35 is particularly aimed at providing supervision in criminal or civil proceeding at any stage of the trial in a Subordinate Court.

[Appeal dismissed.]

Cases referred to:

Amand v. Home Secretary & Anor. [1943] AC 147
Hoo Thian Siong v. PP [1988] 1 CLJ (Rep) 583
Maleb b. Su v. PP [1984] 1 MLJ 311
Mohammad Amin Bros. v. The Dominion of India 937 [1950] AIR FC 77
PP v. Chin Keow [1947] MLJ 55
PP v. Hoo Cheng Chwen [1962] MLJ 284
PP v. R.K. Menon & Anor. [1978] 2 MLJ 152
PP v. Soh Ted Foh [1990] 2 CLJ (Rep) 711
Re Clifford & O'Sullivan [1921] 2 AC 570
Re Roshidi bin Mohamed [1988] 1 MLJ 326
Sofjan & Anor. v. PP [1970] 2 MLJ 272

Legislation referred to:

Control of Imports and Exports Ordinance [Sing], s. 11(2)
Courts of Judicature Act 1964, s. 35
Criminal Procedure Code, ss. 307(i), 323, 325
Criminal Procedure Code [Sing], s. 290(1)
Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)(a)
Subordinate Courts Act 1948, s. 85

For the applicant - Lim Swee Huat; M/s. S.H. Lim & Co.
For the respondent - Ahmad Zaki bin Hj. Husin, DPP

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

Two questions were posed to us under s. 66(1) of the Courts of Judicature Act 1964 as questions of law of public interest which had arisen in the course of an appeal and the determination of which by the Miri High Court had affected the event of the appeal.

The questions are:

1. Whether an order made by a learned Magistrate under s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (Act 283) is an order which falls within the definition of "order pronounced by any Magistrate's Court in a criminal case or matter" as described in s. 307(i) of the Criminal Procedure Code (FMS Cap 6) and therefore there is a right of appeal against such order as provided for under s. 307(i) of the Code.

2. If the answer to question 1 above is in the negative, then does the High Court have power either under s. 35 of the Courts of Judicature Act 1964 (Act 91) or under its inherent jurisdiction to review the decision of the learned Magistrate and make such orders as the High Court might have made as it may consider just for the disposal of the appeal.

The event that brought about the application may be briefly set out as follows. On 19 February 1990 the applicant together with three others were ordered by the Miri Magistrate to undergo treatment and rehabilitation at a drug rehabilitation centre at Kuching for a period of two years with effect from the date of the order. The order was issued by the Magistrate pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983. Under s. 6 of the Act the Magistrate may make such an order if he is satisfied that the person has been certified by a government medical practitioner or a registered medical practitioner to be a drug dependant after undergoing the necessary tests under the provisions of that section. Alternatively the Magistrate may, if he is satisfied that the person's treatment and rehabilitation may be carried out otherwise than at a rehabilitation centre, order that the person be placed under the supervision of a rehabilitation officer for a period not less than two and not more than three years, and to execute a bond with or without sureties.

On 26 February 1990 the applicant filed a notice of appeal to the Miri High Court against the order of the Magistrate. When the matter came up for hearing before Denis Ong J the learned Judge queried whether the applicant had a right to appeal in such a matter. After hearing arguments the learned Judge ruled to the following effect as stated in his written judgment:

(1) an order made under s. 6(1)(a) Drug Dependants (Treatment Rehabilitation) Act 1983 is not an order pronounced by a Magistrate Court in a criminal case or matter to which the applicant is a party under s. 307(i) of the Criminal Procedure Code - (FMS Cap 6) and therefore the applicant has no right to appeal; and

(2) it is not possible for the Court to exercise its revisionary and supervisory powers under ss. 323 and 325 of the Criminal Procedure Code (FMS Cap. 6) and s. 35 of Courts of Judicature Act 1964 (Act 91). The learned Judge thereupon dismissed the appeal.

It can be observed that the questions framed and posed before this Court were based on the said rulings.

In a careful judgment of the learned Judge he based his rulings on two main grounds. Firstly the learned Judge found that the powers conferred on the Magistrate by s. 6 of the Act under which the order was made is expressly conferred on the "Magistrate" as distinct from "Magistrate's Court" and that s. 24(1) of the same Act specifically provides that any power or jurisdiction conferred on a Magistrate under ss. 4 and 6 (amongst others) over matters specified therein may be exercised by the Magistrate at any place whether such matters arose within or outside the local jurisdiction of the Magistrate or within or outside the local limits of his Court notwithstanding anything to the contrary in the Subordinate Courts Act 1948 (Act 92) or the Criminal Procedure Code (FMS Cap. 6) or any other written law.

At a glance this first ground may seem pedantic but a closer examination of provisions of law relating to jurisdiction of the Magistrate shows the merit of this ground.

The criminal jurisdiction of a First Class Magistrate is provided in s. 85 of the Subordinate Courts Act. Section 26 of the Courts of Judicature Act 1964 (Act 91) provides that the appellate criminal jurisdiction of the High Court shall consist of "the hearing of appeals from Subordinate Courts **according to any law for the time being in force** within the territorial jurisdiction of the High Court". The term "Subordinate Court" is defined in s. 3 of Act 91 to mean any inferior Court from the decision of which **by reason of any written law there is a right of appeal to the High Court**.

It would seem to us that the legislative scheme of s. 6 of the Drug Dependants (Treatment and Rehabilitation) Act viewed with the provisions of criminal jurisdiction and appeal in the two legislation referred to show quite clearly that the order of the Magistrate under s. 6 of the Act is not an order appealable to the High Court. This ground alone should dispose of the appeal before the learned Judge.

The second ground set out in the judgment of the learned Judge is the construction of the words "criminal case or matter" under s. 307(i) of the Criminal Procedure Code. Section 307(i) of the CPC provides that any person who is dissatisfied with any **judgment, sentence or order pronounced by a Magistrate's Court in a criminal case or matter to which he is a party** may prefer an appeal to the High Court against such judgment, sentence or order.

To satisfy that provision the order must first of all be a final order. This requirement has already been dealt with in *Maleb b. Su v. PP* [1984] 1 MLJ 311. In that case it was held that the order must be a final order in the sense that it is final in effect as in the case of a judgment or sentence. The test for determining the finality of the order is to see whether the order finally disposes the rights of the parties. That part of the judgment reads as follows.

> First, the question of the right to appeal. Under s. 307(i) of the Criminal Procedure Code any person dissatisfied with any judgment, sentence or order pronounced by the Magistrate in a criminal case may appeal to the High Court against any such judgment, sentence or order. There is no argument, in my opinion that the *ejusdem generis* rule applies to the word "order" which is preceded by the words "judgment" and "sentence". The order must therefore be a final order in the sense that it is final in effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties. See discussion of this point in *Mohammad Amin Bros. v. The Dominion of India* (AIR 937 1950 FC 77). The order which finally disposes of the rights of the parties should be distinguished from a purely procedural ruling. See also *Public Prosecutor v. Hoo Cheng Chwen* [1962] MLJ 284 and *PP v. R.K. Menon & Anor.* [1978] 2 MLJ 152. In the former case Rose CJ of Singapore dealt with an appeal on the admissibility of certain statements and the learned Judge held that the ruling of the Magistrate was a procedural ruling and therefore not an appealable order. In the latter case Ajaib J also correctly took the view that a ruling on non-compliance with s. 129(i)(b) of the Criminal Procedure Code was a procedural and non-appealable ruling.

There is no doubt in the present case that the order has a final effect and disposes of the right of the applicant. But that is not the end of the matter. To satisfy s. 307(i) of the Criminal Procedure Code it is also necessary to answer the equally crucial question - was the order made in a criminal case or matter?

In this regard the learned Judge said he was not assisted nor was he able to find a local case on the question. As a result of his research he found the Court of Appeal case of *Sofjan & Anor. v. PP* [1970] 2 MLJ 272. In that case the Court of Appeal, Singapore had to

consider whether the order made by the District Court after an enquiry under s. 11(2) of the Control of Imports and Exports Ordinance was an order pronounced by a District Court in a criminal case or matter. Section 290(1) of the Singapore Criminal Procedure Code was in *pari materia* with s. 307(i) of our Criminal Procedure Code. The approach taken by the Singapore Court of Criminal Appeal was to consider whether the proceedings before the District Court were criminal in their nature and form and held that such proceedings were not and consequently not a criminal case or matter within the meaning of s. 290(1) of the Singapore Criminal Procedure Code.

We have in fact another local case quite helpful on the same question, that is the case of *Public Prosecutor v. Chin Keow* [1947] MLJ 55. In that case Justice Spenser-Wilkinson sat in the appellate criminal jurisdiction and relied on *Amand v. Home Secretary & Anor*. [1943] AC 147 for the authority that if a cause or matter is one which, carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment it is a criminal cause or matter.

Amand itself relied on *Re Clifford & O'Sullivan* [1921] 2 AC 570 where Viscount Cave laid down two conditions to be satisfied in order that a matter may be a criminal cause or matter. The two conditions laid down by Viscount Cave are firstly, it must involve the consideration of some charge of crime, that is, of an offence against the public law; and secondly, the charge must be preferred or about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence.

In *Amand*, Viscount Simon LC in the House of Lords after referring to Viscount Cave's two conditions said at p. 156 as follows:

> Applying these tests, I cannot doubt that the appellant's application for the writ and decision of the Divisional Court refusing it were "in a criminal cause or matter." He has been apprehended by the police on suspicion of being a deserter or absentee without leave from the Dutch forces, and is being brought before a Court of summary jurisdiction on these charges by a procedure analogous to that of s. 154 of the Army Act, so that the Court, if "satisfied", may deal with him as provided in subs. 4 of that section.

Looking at the provisions relating to jurisdiction of the Magistrate and the appeal provisions provided by our law we agree with the learned Judge that the order made by the Magistrate in this case is not an order pronounced by a Magistrate's Court in a criminal case or matter for the purpose of s. 307(i) of the Criminal Procedure Code.

Our answer to question 1 is therefore in the negative.

Question 2 is concerned with the powers of the learned Judge under ss. 323 and 325 of the Criminal Procedure Code. Section 31 of the Courts of Judicature Act 1964 confers on the High Court powers of revision in respect of **criminal proceedings and matters** in the Subordinate Courts **in accordance with any law for the time being relating to criminal procedure.**

It is obvious from the language of these provisions that our answer to question 2 must also be in the negative.

We appreciate that the provision of s. 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 is penal in character in the sense that a person can be ordered to reside in a rehabilitation centre for two years to undergo treatment probably against his will. At the same time we also appreciate that it is a provision designed for the rehabilitation of drug dependants. It is a social legislation of sorts. But we must not forget however that the

same legislation confers summary powers on the Magistrate and can seriously affect the freedom of an individual. It was perhaps realising this aspect of the legislation that the learned Judge in this case suggested that if the applicant was dissatisfied with the order of the Magistrate he should look elsewhere for reliefs. In other words if any person is dissatisfied with the order of the Magistrate under that provision of the law because of some irregularity, he should have access to the High Court but not through the appeal process. This judgment merely lays down the law that according to existing provisions of the law there is no appeal to or revision by the High Court from the order of the Magistrate under s. 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983.

Section 35 of the Courts of Judicature Act confers general supervisory powers on the High Court over the Subordinate Courts. This provision is to be construed as no more than providing for jurisdictional basis. Read in the context of ss. 31, 32 and 33 of the Act it would seem to us that s. 35 is particularly aimed at providing supervision in criminal or civil proceeding at any stage of the trial in a Subordinate Court.

To complete the record it may be noted that there are at least three reported cases brought to the High Courts by persons affected by an order under s. 6 of the Act.

One is *Hoo Thian Siong v. Public Prosecutor* [1988] 1 CLJ (Rep) 583 which was an application for *habeas corpus* challenging the order of the Magistrate on the ground that he was not represented by Counsel at the hearing. The learned Judge there, Mustapha Hussain J ruled that it was encumbent on the learned Magistrate to give the applicant the opportunity of making a representation.

There was also an application made to the High Court in Kangar in *Re Roshidi bin Mohamed* [1988] 1 MLJ 326. There the applicant contended that the Magistrate did not comply with the various subsections of s. 6 of the Act. The learned Judge, Mohamed Ariff J held that in the absence of the record of proceedings kept by the learned Magistrate it was impossible to hold that the mandatory requirements of the law had been complied with and granted the application.

Finally there is *PP v. Soh Ted Foh* [1990] 2 CLJ (Rep) 711. In that case the learned Magistrate, after hearing objection from Counsel, released the subject. In making the said order of release the learned Magistrate indicated that she would be referring the case to the High Court purporting to do so under s. 323 of the Criminal Procedure Code to determine the correctness of her order. Subsequently the record of the proceedings and her written ruling were sent to the High Court. The learned Judge (Haidar J) examined the record of the proceedings and dealt with the interpretation of s. 6 of the Act without first determining his jurisdiction to do so.

Also found at [1991] 2 CLJ 857